



**Mbaka & another v Njiru & 2 others (Civil Appeal E069 of 2023)  
[2024] KEHC 10487 (KLR) (27 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10487 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E069 OF 2023  
LM NJUGUNA, J  
AUGUST 27, 2024**

**IN THE MATTER OF THE ESTATE OF MARGARET WAITHIRA NJIRU (DECEASED)**

**BETWEEN**

**DOMINIC NJIRU MBAKA ..... 1<sup>ST</sup> APPELLANT**

**GODFREY MURIMI NJIRU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANTHONY MAINA NJIRU ..... 1<sup>ST</sup> RESPONDENT**

**AGNES WANGUI NJIRU ..... 2<sup>ND</sup> RESPONDENT**

**CAROLINE WAIRIMU NJIRU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal arising from the decision of Hon. N. Kabara SRM in Siakago Chief Magistrate's Court Succession Cause No. 171 of 2018 delivered on 18th October 2023)*

**JUDGMENT**

1. The appellants have filed a memorandum of appeal dated 17<sup>th</sup> November 2023, challenging the decision of the trial court and seeking the following orders:
  - a. That the ruling on distribution of land parcel number Nthawa/Gitiburi/2855 be set aside and/or reviewed and the same be distributed as proposed in paragraph 5 of the affidavit in support of the summons for confirmation of grant dated 27<sup>th</sup> July 2021;
  - b. That the ruling on distribution of 5,000 shares in Co-operative Bank Ltd and 40 shares in Cooperative Bank Ltd be set aside and/or reviewed and the same be distributed as proposed in paragraph 5 of the affidavit in support of the summons for confirmation of grant dated 27<sup>th</sup> July 2021; and



- c. That the costs of the appeal be borne by the respondents.
2. The appeal is premised on grounds that:
  - a. The learned trial magistrate erred in law and fact by declaring a life interest over parcel number Nthawa/Gitiburi/2855 instead of distributing the same to the beneficiaries of the deceased's estate, as proposed in the summons for confirmation of grant;
  - b. The learned trial magistrate erred in law and fact by declaring a life interest over the 5,000 shares in Co-operative Bank Ltd and 40 shares in Cooperative Bank Ltd instead of distributing the same to the beneficiaries of the deceased's estate, as proposed in the summons for confirmation of grant;
  - c. The learned trial magistrate misdirected herself by failing to consider the evidence and the pleadings on the court record that none of the beneficiaries is a minor and thus no need for creation of a trust by declaring a life interest over any properties of the deceased's estate; and
  - d. The learned trial magistrate erred in law and fact by failing to distribute the entire estate of the deceased with finality.
3. A grant of letters of administration in the estate of the deceased was issued to the appellants. They filed summons dated 27<sup>th</sup> July 2021 seeking confirmation of the grant which was accompanied by a supporting affidavit proposing that parcel number Nthawa/Gitiburi/2855 be distributed between the appellants. They also proposed that the 1<sup>st</sup> appellant wholly receive the 5,040 shares in Cooperative Bank Ltd. The respondents filed an affidavit of protest in which they proposed that parcel number Nthawa/Gitiburi/2855 and the shares in Cooperative Bank Ltd be distributed equally amongst all the beneficiaries.
4. The protest was disposed of by way of written submissions and the court made its decision. It was the appellant's argument through submissions that as the husband of the deceased, he was entitled to a life interest in the property and the shares since he acquired them jointly with the deceased. That his life interest in the property supersedes his children's interest in the property. He relied on section 35 of the *Law of Succession Act* and the cases of *Tau Katungi v Margrethe Thorning Katungi & Another* (2014) eKLR and *Edda Wangu & Another v. Sacilia Magwi Kivuti (deceased)* (2021) eKLR where the sentiment of the courts was that Section 35 was meant to safeguard the interest of the spouse of the deceased. That the 1<sup>st</sup> appellant is elderly and the respondents do not provide for him so he needs a life interest in the properties.
5. The respondents, who were the protestors, relied on the cases of *Justus Thiora Kiugu & Others v. Joyce Nkatha Kiugu & Another* (2015) eKLR and *Tau Katungi v Margrethe Thorning Katungi & Another* (2014) eKLR. They argued that the life interest equates a trust which is inapplicable in this case because the children of the deceased are all adults. That the 1<sup>st</sup> appellant holding of a life interest is not absolute and he cannot hold the properties for his adult children. They also relied on the case of *The Estate of John Musambayi Katumanga (deceased)* (2014) eKLR. The trial court gave the 1<sup>st</sup> appellant a life interest in the contested properties through the impugned ruling, reasoning that the 1<sup>st</sup> appellant needed not be placed at the mercy of his children for sustenance.
6. The appeal herein was canvassed by way of written submissions.
7. The appellants submitted that the trial court erred in giving the 1<sup>st</sup> appellant a life interest in the disputed properties. They relied on section 35 of the *Law of Succession Act* and noted that the Act does not define 'life interest' but they went by the definition provided under the 9<sup>th</sup> Edition *Black's Law*



*Dictionary*. They also relied on the cases of *Ludiah Chemutai Bett v. Joseph Kiprop Tanui* (2017) eKLR, *Tau Katungi v Margrethe Thorning Katungi & Another* (2014) eKLR and *Edda Wangu & Another v. Sacilia Magwi Kivuti (deceased)* (2021) eKLR where the courts held that the spouse's life interest is determined upon his death or upon his bequeathing the property to his children. That by declaring a life interest, the trial court limited the 1<sup>st</sup> appellant right to generate income from the properties for his sustenance. That the 1<sup>st</sup> appellant is denied an absolute right to the estate since he cannot dispose the same but can only enjoy it during his lifetime as was stated in the case of *Tau Kakungi v Margrethe Thorning Katungi & Another* (2014) eKLR. Further reliance was placed on the textbook by John Stuart Mill, *Principles of Political Economy*, OP. CH N 41 BK11 CL2, Para. 3. He urged the court to allow the appeal and distribute the properties according to the mode proposed in the supporting affidavit to the summons for confirmation.

8. On their part, the respondents stated that the trial court's decision was made through judicial discretion which should not be disturbed on appeal and they cited the case of *Mbogo & Another v. Shah* (1968) EA, p.15. They stated that the court proceeded pursuant to section 35 of the *Law of Succession Act* and the case of *Justus Thiora Kiugu & Others v. Joyce Nkatha Kiugu & Another* (2015) eKLR where the court held that in the absence of a consent on the mode of distribution, the trial court was constrained to apply the provisions of section 35 of the *Law of Succession Act*.
9. They also cited the case of *Tau Katungi v Margrethe Thorning Katungi & Another* (2014) eKLR. It was their argument that the 1<sup>st</sup> appellant can sell the property only with the consent of the other beneficiaries who are the children of the deceased. That the essence of a life interest is to ensure that the surviving spouse does not dispose of or waste the deceased's estate such that the children of the deceased will not have anything to inherit upon his death. They urged the court to dismiss the appeal, terming it as baseless.
10. From the foregoing, the issue for determination is whether the trial court erred in granting the 1<sup>st</sup> appellant a life interest in disputed portion of the estate of the deceased as opposed to absolute ownership.
11. This court is bound to re-examine the evidence adduced at the trial court and make its own findings. This was the sentiment in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the court stated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
12. The trial court was faced with summons for confirmation of grant, which was opposed through protests by the respondents herein jointly. They took issue with distribution of the estate and they sought to have all the properties divided equally amongst all the beneficiaries. The court ended up with a distribution which resulted in the 1<sup>st</sup> appellant being given a life interest in parcel number Nthawa/Gitiburi/2855 and 5,040 shares at Cooperative bank Ltd. He was also given other properties as detailed in the trial court's judgment. The 1<sup>st</sup> appellant is dissatisfied with this position since the life interest is not absolute and it limits his rights to sell the property to keep up with his daily sustenance and medication.



13. The arguments made by the parties through submissions before the trial court were considered. The appellants stated that the 1<sup>st</sup> appellant acquired the properties jointly with the deceased and so he is deserving of the portions he had proposed to inherit wholly. The respondents urged the court to consider section 35(1) of the Law of Succession Act and corresponding caselaw to distribute the estate. In this appeal, the appellant's decried the findings of the trial court and argued that the life interest amounts to a trust which is unnecessary in this case, given that the children of the deceased are all adults. This position is countered by the respondents who are of the view that section 35 is not without safeguards within the Law of Succession Act and that the 1<sup>st</sup> appellant may dispose the properties over which he has a life interest subject to consent of the court and/or the beneficiaries.

14. The undisputed fact from the summons for confirmation and the protests is that the 1<sup>st</sup> appellant is the spouse of the deceased. During distribution of the estate, the trial magistrate considered the modes of distribution proposed by the opposing sides and was guided by jurisprudence by superior courts. The court of appeal in the case of Justus Thiora Kiugu & 4 Others v. Joyce Nkatha Kiugu & Anor', Civil Appeal No. 30 of 2014 (2015) eKLR was of the view that distribution is better off done through consent of the parties where there is a surviving spouse and children. In the absence of a consent, the court has no choice but to strictly apply the Law of Succession Act. It held thus:

“....an estate of a deceased person who died intestate leaving one spouse and children like in this case of M'Ikiungu Mwirichia cannot legally be distributed in any other way other than the parties agreeing among themselves and filing a consent, or by the court following the provisions of Section 35 of the Law of Succession. In the event that the parties agree and they record consent on the mode of distribution, the court has no choice but to adopt the consent and make it an order of the court. Short of a written consent on the mode of distribution, the court has no discretion but to distribute the estate of the deceased as per the provisions of Section 35 of the Law of Succession which makes provisions for an intestate who has left one surviving spouse and child or children.”

15. I do agree with the trial court's finding to this extent since the distribution is within the law. This appeal only concerns itself with parcel number Nthawa/Gitiburi/2855 and 5,040 shares at Cooperative bank Ltd for which the life interest was given to the 1<sup>st</sup> appellant. Section 35 safeguards the right of a surviving spouse over the Estate thus:-

“Where intestate has left one surviving spouse and child or children

- 1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
  - a) the personal and household effects of the deceased absolutely; and
  - b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.
- 2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.”



16. In the case of *In Re Estate of John Musambayi Katumanga (Deceased)* (2014) eKLR the court spoke of a life interest as follows:

“...Spouses during marriage take care of each other. They depend on one another for a variety of material and emotional things....the surviving spouse takes the household goods and enjoys a life interest in the capital assets. Ideally, an estate ought not be distributed during life interest.”

17. A life interest is to be enjoyed by the surviving spouse until death (or remarriage in the case of a widow). The 1<sup>st</sup> appellant is the deceased’s widower, meaning that the only way that his life interest in the estate will determine is in the event of his death. In the case of *re Estate of Walter Kiplangat Arap Chamdany (Deceased)* (2021) eKLR the court stated thus:

“Following the law as set out above and the legal principles as espoused in the above cited authorities, I agree with the Petitioner that presently, she holds a life interest in the Estate of the deceased. And while this entitlement is not absolute, her children, including the Applicant are not entitled to seek to have the property devolve to them except where the Petitioner remarries or passes on. In the absence of these two events, she continues to enjoy a life interest in the net intestate Estate while at the same time holding it in trust for her surviving children. I must state however, that Section 35 (2) of the *Law of Succession Act* empowers the Petitioner to apportion any part of the intestate Estate to any of her children who were the ultimate beneficiaries of the Estate. Conversely, the law gives a remedy to a beneficiary aggrieved by a surviving spouse during the subsistence of the life interest....”

18. The 1<sup>st</sup> appellant’s apprehension is that his children are failing to take care of him and yet he needs to maintain himself. While he does not have an absolute right to the property, thus he cannot sell it without consent, section 37 of the *Law of Succession Act* provides that he can seek the court’s consent to sell immovable property. It states:

“A surviving spouse entitled to a life interest under the provisions of section 35 or 36, with the consent of all co-trustees and all children of full age, or with the consent of the court, may, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court.”

19. As it is, the Act already envisioned a scenario whereby the surviving spouse may need to sell a part of the estate for which he has a life interest. Through this appeal, it is not possible for the court to grant absolute ownership to the 1<sup>st</sup> appellant since there is no basis in law to do so. However, he may pursue the necessary consents to enable him dispose of the property for his maintenance.

20. For these reasons, I find that the appeal lacks merit and it is hereby dismissed.

21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF AUGUST, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the 1<sup>st</sup> Appellant



..... for the 2<sup>nd</sup> Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

..... for the 3<sup>rd</sup> Respondent

